REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 299 OF 2010

DEV KARAN @ LAMBU ….Appellant(s)

VERSUS

STATE OF HARYANA ….Respondent(s)

WITH

Crl.A. No. 300/2010

Crl.A. No. 302/2010

Crl.A. No. 1139/2010

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. On the fateful date of 28.7.1994 at 3 a.m., Jaibir @ Gabbu (for short 'deceased') was murdered. An FIR was registered on the same date

by one Surender (PW-7). The prelude culminating in the incident has been set out in the FIR.

2. The residential house of the deceased was under-construction, at Modawala Bagh in Bhiwani. A group of friends – Surender (PW-7), the deceased, Ajay Bhan (PW-8), another Surender S/o Rajender Singh (not examined), Sandeep (not examined) and Narender (not examined) were sitting and consuming liquor in one of the rooms of the under construction house. It appears that the liquor possibly fell short, as the deceased asked Sandeep to bring half a bottle of liquor from the English vend. After some time, the remaining friends who were in the room heard raised voices of Sandeep. In order to enquire as to what was transpiring, Surender (PW-7/complainant), the deceased and Narender went towards the liquor shop. In the proximity of the liquor shop, near the tea shop of Naresh Kumar, these three persons saw accused Krishan and Vidhya Rattan (original accused No.3/appellant[1]) abusing and quarrelling with Sandeep. Heated words were exchanged and threats were held out. The deceased asked Krishan and Vidhya Rattan to come during the day to discuss the matter with the complainant and his friends.

1 Appellant in Crl.Appeal No.300/2010

The complainant, the deceased, Narendar and Sandeep thereafter came back to the under-construction, residential house.

3. It is the case of the complainant that just as these friends were, once again, in the process of resuming their drink, seven persons (all arrayed as accused before the trial court) entered the under-construction house of the deceased, armed with deadly weapons like wooden rafter, *lathis* and sword. Rajesh Yadav (accused No.1), who has since passed away, was armed with a *bahi* (a rectangular wooden rafter, which is used in making cots), and proclaimed that the deceased, referred to as the 'leader', be killed, and then he hit the deceased on the head with the wooden rafter. A *lathi* blow was given by Krishan on the head of the deceased. The consequence of these blows was that the deceased fell to the ground. The assault continued when Suresh (original accused No.5/appellant[2]) also gave a wooden rafter blow on the left leg of the deceased. Rajesh Yadav (accused No.1), since deceased, raised a *lalkara* that Jaibir (the deceased) be killed altogether. All the accused thereafter started hitting the deceased indiscriminately with their respective weapons. A variety of weapons were used to carry out the assault, with

2 Appellant in Crl. Appeal No.302/2010

Rajesh Yadav and Suresh being armed with *bahis*, while Rajesh Jogi (original accused No.4/appellant[3]) being armed with *kirpan* (sword) and the remaining four accused carrying *lathis*.

4. The endeavour of the complainant to intervene, only ended up in blows being received by him from different accused, and the same was the consequence for Ajay Bhan (PW-8), on his endeavour to intervene, too. All the accused persons are stated to have run away from the place of occurrence of the event, once the remaining companions of deceased herein raised an alarm. The deceased succumbed to his injuries, though was taken for treatment to the General Hospital, Bhiwani. The examination of PW-8 and PW-7 resulted in the doctor opining that PW-8 had multiple lacerated wounds on the scalp, and that his right forearm bones, left forearm bones and right foot were fractured. After giving necessary medical treatment, he was referred to the Medical College, Rohtak on the same day. Surender (PW-7/complainant) was found with a surgical emphysema[4] on the right side, which was the reason for his reference to the Medical College, Rohtak. The *ruqa* was sent to the Police Station, Bhiwani at 4:15 a.m. by the doctor on duty, Dr. Aditya

3 Appellant in Crl. Appeal No.1139/2010
4 A condition in which the air sacs of the lungs are damaged and enlarged, causing breathlessness.

Sarup Gupta. Suffice to say, the various injuries inflicted on these two persons were found by the doctor to have been inflicted with blunt weapons, with some of the injuries being grievous in nature, while the remaining ones being simple. But for timely medical aid, the injuries could have proved fatal, opined the doctor. Both these persons were declared fit to make statements at 5:40 a.m., on 28.7.1994.

5. On the *ruqa* being sent, the SHO of the Police Station at Bhiwani reached the hospital to record the statements of PW-7 and PW-8. The formal FIR was registered, thus, at 7:15 a.m., imputing a common object to all the accused, to murder the deceased. On inquest proceedings being conducted, the body was sent for post-mortem. A special report was received by the Chief Judicial Magistrate ('CJM'), Bhiwani at 9:00 a.m., and a rough site plan was made by the SHO at the site, who also collected blood stained earth, one *chaddar*, one *pajama* shirt of the deceased, one *pajama*, *kamij* and *baniyan* in torn condition. Four of the accused – Krishan, Vidhya Rattan, Suresh and Rajesh Jogi were apprehended/arrested on 28.7.1994 and questioned. On the post-mortem being concluded, the deceased was found to have suffered, *inter alia*, the following injuries:

- Multiple lacerated wounds on the parieto-occipital area of the scalp, and various other parts of the forehead, scalp. On opening the skull bone, subdural haematoma was found at the corresponding site of fracture, one the right side of the parietal bone.
- Lacerated wounds on the left eye brow, lower eye lid, right forearm, and left leg.
- Fracture of bones in the left leg.
- Bruises on the right shoulder, right upper arm, chest, abdomen, left and right thigh, left and right knee.
- Abrasions on the left should, left forearm.

The cause of death was opined to be shock and haemorrhage, as a result of injuries, which were sufficient in the normal course of nature, to cause death. These injuries were quite possibly as a result of blows from *lathis*, *bahis* and sword.

6. The disclosure statement, post the interrogation of the arrested accused on 29.7.1994, resulted in recovery of the weapons and clothes worn by them at the time of the incident. On the same day, Rajesh Yadav

(accused No.1) was also arrested, and his disclosure statement led to the recovery of a *bahi*. Dev Karan (original accused No.6/appellant[5]) was, however, arrested subsequently, on 1.8.1994, and he led to the discovery of *lathis*, for which assistance was also provided by the accused, Karma.

7. On completion of investigation, a chargesheet was filed on 15.11.1994, and charges were framed under Sections 148, 302, 307, 325 read with Section 149 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and Section 449 of the IPC. The accused pleaded innocence, and during trial, seventeen prosecution witnesses were examined. No witnesses were examined as defence witnesses. Rajesh Yadav died during trial. The remaining arrested accused were found guilty and convicted under Sections 148, 302, 307, 325 read with Section 149 of the IPC and Section 449 of the IPC. All the accused were sentenced for life, with fine of Rs.500 each under Section 302 of the IPC. They were also sentenced to undergo rigorous imprisonment ('RI') for seven years each along with a fine of Rs.500 each under Section 307 of the IPC with similar sentence under Section 149 of the IPC. The accused were also directed to undergo RI for three years each with a fine of

5 Appellant in Crl. Appeal No.299/2010

Rs.200 each under Section 325 of the IPC, and under Section 148 of the IPC, they were sentenced to RI for 2 years each with fine of Rs.200 each. The sentences were directed to run concurrently. All the accused were held guilty under Section 149 of the IPC as they constituted an unlawful assembly, as a result of which, it was opined that specific attribution of injuries caused by each individual was not required to be considered.

8. It may also be noticed that Karma (A-7) was apprehended subsequently, and was convicted in a subsequent trial. The accused filed appeals. The High Court, however, dismissed the appeals in terms of the impugned judgment and order dated 19.9.2008.

9. Against the order of the High Court, Krishan (A-2) and Karma (A-7) did not prefer further appeal to this Court, and seemingly accepted the sentence. Thus, only Vidhya Rattan (A-3), Rajesh Jogi (A-4), Suresh (A-5) and Dev Karan (A-6) preferred appeals, which four appeals have been examined by us, in the present judgment.

10. Learned counsel advanced submissions on behalf of A-4 and A-6, i.e., Rajesh and Dev Karan. The gravamen of the submissions was the

plea that no charges had been framed under Section 141 of the IPC. In addition, it was submitted that the prelude to the incident was an alleged altercation between Sandeep and A-2 & A-3. However, for reasons best known to the prosecution, Sandeep, who was the sole person who could have thrown light as to what gave rise to the initial quarrel, has not been examined. Not only that, Sandeep is alleged to have come back with the liquor after the incident, and thereafter, all the accused are alleged to have come to the spot and beat up the deceased. The third aspect emphasised was that the main injury, which would have caused the death, was an injury on the head by the wooden rafter, which was delivered by A-1, who passed away during the trial.

11. Learned counsel took us through the provisions of Chapter VIII of the IPC, dealing with 'Offences against the Public Tranquility'. It was his submission that the provisions have to be ready holistically, and in sequence. Thus, Section 141 of the IPC defines an 'Unlawful Assembly' as an assembly of five or more persons with a common object. Such common objects are specified in the Section, and what would be applicable, in this case, would be the third aspect, i.e., "to commit any

mischief or criminal trespass, or other offence." Section 142 of the IPC provides that a person who, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly, while Section 143 of the IPC provides the punishment for being part of such an unlawful assembly. Section 144 of the IPC deals with joining an unlawful assembly, armed with deadly weapon, which is likely to cause death; Section 146 of the IPC deals with rioting; Section 147 of the IPC deals with punishment for rioting while Section 148 of the IPC deals with rioting, armed with deadly weapon. Section 149 of the IPC reads as under:

> "**149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.**—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

12. It was, thus, the submission advanced that unless there is infliction of punishment under Section 143 of the IPC, as a sequitur to forming an unlawful assembly under Section 141 of the IPC, there could be no cause

to apply Section 149 of the IPC.

13. Learned counsel referred to the judgment in ***Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel &Ors.,***[6] to elucidate his submission. The concept of vicarious liability, as a result of which a large number of accused constituting an unlawful assembly can be held guilty, has been discussed, to hold that it is not necessary that each of the accused inflict fatal injury or any injury at all; the mere presence of an accused in such an assembly is sufficient to render him vicariously liable under Section 149 of the IPC, for causing the death of the victim of the attack, provided that the accused are told that they are to face the charge, rendering them so vicariously liable. The principle of this vicarious liability, under Section 149 of the IPC has been set out in para 28 of the judgment and reads as under:

> "Section 149 propounds a vicarious liability [Shambhu Nath Singh v. State of Bihar, AIR 1960 SC 725: 1960 CrlLJ 1144] in two contingencies by declaring that (i) if a member of an unlawful assembly commits an offence in prosecution of the common object of that assembly, then every member of such unlawful assembly is guilty of the offence committed by the other members of the unlawful assembly, and (ii) even in cases where all the members of the unlawful assembly do not share the

6 (2018) 7 SCC 743

same common object to commit a particular offence, if they had the knowledge of the fact that some of the other members of the assembly are likely to commit that particular offence in prosecution of the common object."

14. The concept of unlawful assembly under Section 149 of the IPC was, thus, as per para 31, opined to have two elements:

"(i) The assembly should consist of at least five persons; and

(ii) They should have a common object to commit an offence or achieve any one of the objects enumerated therein."

15. In that context, in paras 32 & 33, it has been observed as under:

"32. For recording a conclusion, that a person is (i) guilty of any one of the offences under Sections 143, 146 or 148 or (ii) vicariously liable under Section 149 for some other offence, it must first be proved that such person is a member of an "unlawful assembly" consisting of not less than five persons irrespective of the fact whether the identity of each one of the 5 persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the 5 enumerated objects specified under Section 141 IPC.

33. The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the assembly, in our

> opinion is impermissible. For example, if more than five people gather together and attack another person with deadly weapons eventually resulting in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who had inflicted the fatal injuries (as proved by medical evidence); merely on the ground that the injuries inflicted by such members are relatively less serious and non-fatal."

16. The submission, thus, was that the significance of not invoking Section 141 of the IPC is that the very substratum of constituting an unlawful assembly did not exist.

17. To support the aforesaid line of reasoning, a reference was also made to the earlier judgment in ***Dani Singh v. State of Bihar***[7], where, in para 11 it has been observed as under:

> "11. The emphasis in Section 149 IPC is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an

7(2004) 13 SCC 203

assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly."

18. In order to appreciate the significance of specifically invoking Section 141 of the IPC, it would be appropriate to refer to the judgment

of this Court in ***Mahadev Sharma v. State of Bihar***[8]. This Court opined that for application of Section 149 of the IPC, there must be an unlawful assembly. The scheme of the provisions was explained as under:

> "9. The fallacy in the cases which hold that a charge under Section 147 is compulsory arises because they overlook that the ingredients of Section 143 are implied in Section 147 and the ingredients of Section 147 are implied when a charge under Section 149 is included. An examination of Section 141 shows that the common object which renders an assembly unlawful may involve the use of criminal force or show of criminal force, the commission of mischief or criminal trespass or other offence, or resistance to the execution of any law or of any legal process. Offences under Sections 143 and 147 must always be present when the charge is laid for an offence like murder with the aid of Section 149, but the other two charges need not be framed separately unless it is sought to secure a conviction under them. It is thus that Section 143 is not used when the charge is under Section 147 or Section 148, and Section 147 is not used when the charge is under Section 148. Section 147 may be dispensed with when the charge is under Section 149 read with an offence under the Indian Penal Code."

19. Thereafter, it has been opined that if charges framed against the appellant contain all the necessary ingredients to bring home to each of the member of the unlawful assembly, the offence, with aid of Section 149 of the IPC, and the prosecution proves the existence of an unlawful assembly with a common object, which is the offence, as also the

8(1966) 1 SCR 18

membership of each appellant, nothing more is necessary. The effect of these observations is that Section 141 of the IPC only defines what is an unlawful assembly and in what manner the unlawful assembly conducts itself, and in what cases the common object would make the assembly unlawful is specified in the Sections thereafter, inviting the consequences of the appropriate punishment in the context of Section 149 of the IPC.

20. In ***KuldipYadav v. State of Bihar***[9], it has been opined in para 36 that a clear finding regarding the nature of the common object of the assembly must be given and the evidence discussed must show not only the common object, but also that the object was unlawful, before recording a conviction under Section 149 of the IPC. What is required is that the essential ingredients of Section 141 of the IPC must be established.

21. On examination of the aforesaid aspect, we are unable to come to a conclusion that there was any fatal flaw in the non-inclusion of Section 141 of the IPC while framing charges, as would render the complete trial illegal, or that it can result in a finding that there would be no occasion to

9(2011) 5 SCC 324

invoke Section 149 of the IPC. Learned counsel appears not to have appreciated the judicial pronouncements in the correct perspective, as what is necessary for invoking Section 149 of the IPC has been set out in these judgments. It has nowhere been said that Section 141 of the IPC should be specifically invoked or else the consequences would be fatal. As long as the necessary ingredients of an unlawful assembly are set out and proved, as enunciated in Section 141 of the IPC, it would suffice. The actions of an unlawful assembly and the punishment thereafter are set out in the subsequent provisions, after Section 141 of the IPC, and as long as those ingredients are met, Section 149 of the IPC can be invoked.

22. In the factual context, it is observed that whatever be the altercation or argument between Sandeep and the seven accused, it resulted in the seven accused armed with deadly weapons coming to the site of the incident, being the under-construction house of the deceased, and all of them inflicting blows on the deceased. Rajesh Yadav, since deceased, not only inflicted a blow with a *bahi*, but also raised a *lalkar* that the deceased should be killed. All the other accused also inflicted blows on the deceased. Even the interventions of PW-7 & PW-8 did not

result in their desisting from such assault, but on the other hand, even PW-7 and PW-8 received injuries as a result thereof. This is not a case where the common assembly proceeded to the site and subsequently decided to inflict the blows. It is not as if anyone incidentally joined the group, but all of them came together with a clear intent and acted upon that intent. It was not as if any of the accused ran away from the site, or ceased to have the intent to inflict blows, which resulted in the death of the deceased. The common object is, thus, writ large on its face. There were, at least, 24 injuries inflicted on the deceased, and both the courts below have found that the version given by PW-7 and PW-8 evoke confidence, who were themselves injured in the incident. Minor discrepancies were, thus, found to be a natural cause, where so many persons attacked suddenly. The accused were known to the eye-witnesses and, thus, there can be no case of mistaken identity. There was no unexplained delay in filing the FIR.

23. No doubt the IO had deposed that the liquor shops remain open up to 11 p.m., but that itself would not belie the story, as it is not difficult to conceive of the ability to obtain liquor at that hour, which is substantiated by the fact that the liquor was obtained and the persons at the site were

having a drink after having run through the initial amount of liquor.

24. We may, however, notice that no doubt Sandeep ought to have been examined as also the other persons, Narender, who visited the initial altercation place subsequently. The prosecution undoubtedly faltered there. The question, however, is whether this would, in any manner, cast a doubt on the incident, or the manner of infliction of injuries on the deceased and the eye-witnesses, which resulted in the death of the deceased. On an analysis of the facts of the present case, our answer would be in the negative. The saving grace, however, is that Surender, son of Bhagwan Singh had been examined, being PW-7, as the complainant, who has succinctly set out the scene. The injured witnesses knew the accused. That the site was an under construction site would not mean that there was no lighting at all so as to cause a confusion about the identity of the accused.

25. We may also notice that there are concurrent findings of the trial court and the appellate court, which have appreciated the evidence, and we do not think that this Court should convert itself into a third court of

appeal for appreciation of evidence.

26. We are also unimpressed by the argument that the sentence may be converted into one under Section 304 Part II as a period of nine and a half years has been served by the accused, as a convict. The manner of the attack, the common object with which it was made, the nature of the injuries do not permit us to take a more compassionate view of the matter in this case, to only facilitate the accused in serving a lesser sentence, other than what the legislature mandates, i.e., the life sentence (the option only being the death sentence).

27. We, thus, find no merit in the case sought to be made out on behalf of the accused Nos.4 & 6.

28. A valiant endeavour was made by Mr. Basant, learned senior counsel on behalf of A-5, Suresh, on the substantive plea of absence from the site, i.e., no participation in the incident, but a case of mistaken identity. The crucial infirmity is stated to be the non-examination of Sandeep as a witness, who had the quarrel with A-2 and A-3. However,

this aspect, we have already discussed aforesaid. Since the conviction is basically on the statement of PW-7 and PW-8, i.e., the injured witnesses, learned counsel sought to show some inconsistencies in the testimonies of the two witnesses, as also in the identification of A-5 by PW-7, the complainant, in the F.I. Statement. It was submitted that the original identification was of one Lala. In the FIR, it is stated that it was Suresh @ Lala (A-5). It was, thus, submitted that nothing has been explained as to how Lala became Suresh @ Lala in the FIR or how the IO recorded so. The inquest report is also stated to be only referring to Lala. Thus, the submission was that while the accused was Suresh, he was not known as Lala. Suresh was stated to be in his native village, and not at the site on the fateful date, but, that is an alibi which even other accused have pleaded.

29. Learned senior counsel sought to read extensively from the statement of PW-7 and PW-8. PW-8 has not alleged that A-5 inflicted any injury on his person, while PW-7 has specifically alleged that A-5 hit PW-8. On the other hand, PW-7 attributes a rafter blow on the leg of the deceased to A-5, while PW-8 does not state so specifically, but refers to blows given in general.

30. On examination of the aforesaid pleas, we would agree that these discrepancies fall under what has been labeled by the High Court as ‘minor discrepancies’, more so in an incident of this nature, where all the accused were inflicting blows on the deceased, at tandem. PW-7 and PW-8 also became victims of this attack, when they tried to intervene. It would be difficult to accept that in such a situation, the narration should be absolutely exact, rather there should be a broad consistency in what transpired at the time of the incident. To accept the plea of the learned senior counsel, which at first blush may seem to have some merit, on a deeper examination would amount to nit picking the testimony of the witnesses to somehow obtain an acquittal. We may also notice that there was no past enmity, which could be attributed against A-5 alone as to rope him in. In fact, the grievance of the deceased was about the collective behavior, in the past, of all the accused. This resulted in all the accused using the opportunity of a small verbal tiff with Sandeep, to come to the site of the incident, which was the under construction house of the deceased, to inflict the deadly blows on the deceased, culminating in his death.

31. Learned counsel for the State also invited our attention to the discussion in the impugned order qua the aspect of the identification of A-5 as under:

> "….In the FIR, accused Suresh has been described as Lala Ahir resident of Munthiya Kheri. The eye witnesses have, however, described/identified him as Suresh @ Lala, while appearing in the witnesses box. Undisputedly, accused Suresh is resident of Munthiya Kheri. The eye witness already knew him. This leads to the inference that he must have been known as Lala also and, thus, his presence at the spot cannot be doubted."

32. The testimony of PW-8 further shows that he had seen A-6 and other accused persons earlier when they had been identified to him, at that stage. It is in those circumstances that he identified all the accused. The fact also remains that A-3, A-4 and A-5 were arrested on the same day, though A-6 was arrested subsequently. The recovery of weapons was also made due to the disclosure statement of A-5. We are, thus, not persuaded to accept the plea of mistaken identity, as sought to be advanced by the learned senior counsel, which is what is stated to be the real case distinguishing A-5 from other accused.

33. We may also note that insofar as A-3 is concerned, all arguments of

A-5 were adopted, except the argument about mistaken identity but then, that is the only plea of A-5, other than formally adopting the arguments of A-4 and A-6, which have already been rejected.

34. The net result of the aforesaid discussion is that all the four appeals must fail and are, thus, accordingly dismissed.

35. The accused are directed to surrender forthwith before the trial court, within a period of fifteen days from today, to serve out the remaining sentence.

36. Needless to say, if there is any remission earned, after serving out the appropriate sentence, their cases would be considered for release in terms of the norms of the State Government.

....……J.
[Sanjay Kishan Kaul]

....……J.
[K.M. Joseph]

New Delhi.
August 06, 2019.